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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KOREAN AIR LINES CO., LTD.,

Cross-Petitioner,

—v.—

MARJORIE ZICHERMAN, individually and as executrix
of the estate of Muriel A.M.S. Kole, and Muriel Mahalek,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, pursuant to the general maritime law principles of *Gaudet*¹, and in light of *Higginbotham*² and *Miles*³, nonpecuniary damages for loss of society are recoverable for a death occurring on the high seas within the meaning of DOHSA⁴ during the course of international air transportation within the meaning of the Warsaw Convention⁵?

¹ *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

² *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

³ *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

⁴ Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), reprinted in note following 49 U.S.C. App. § 1502.

LIST OF ALL PARTIES AND RULE 29.1 LISTING**A. Cross-Petitioner**

The Cross-Petitioner is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of The Hanjin Group are:

- Hanjin Transportation Co., Ltd.
- Hanil Development Co., Ltd.
- Hanjin Shipping Co., Ltd.
- Jungsuck Enterprise Co., Ltd.
- Korea Air Terminal Service Co., Ltd.
- Air Korea Co., Ltd.
- Jedong Industries, Ltd.
- Hanjin Travel Service Co., Ltd.
- Hanjin Construction Co., Ltd.
- Korea Freight Transportation Co., Ltd.
- Hanjin Data Communications Co., Ltd.
- Hanil Leisure Co., Ltd.
- Hanjin Information Systems & Telecomm. Co., Ltd.
- Pyung Hae Mining Development Co., Ltd.
- Cheju Mineral Water Co., Ltd.
- Union Express, Ltd. Co., Ltd.
- Hanjin Heavy Industries Co., Ltd.
- Femtco Shipping Co., Ltd.
- Oriental Fire & Marine Insurance Co., Ltd.
- Korean French Banking Corporation - SOGEKO
- Hanjin Investment & Securities Co., Ltd.
- Inha University Foundation
- Jungsuck Foundation

B. Cross-Respondents

The Cross-Respondents are Marjorie Zicherman and Muriel Mahalek, who were the plaintiffs-appellees/cross-appellants in the Court of Appeals.

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OCTOBER TERM, 1994

No. ____ - ____

KOREAN AIR LINES CO., LTD.,

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MARJORIE ZICHERMAN, individually and as executrix
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner KOREAN AIR LINES CO., LTD. (hereinafter "KAL"), respectfully requests that a writ of certiorari issue pursuant to this Cross-Petition to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on December 5, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 43 F.3d 18 (2d Cir. 1994) and is reproduced in the Appendix to the Petition for Writ of Certiorari filed by Cross-Respondents on February 9, 1995 at A1-11.¹

¹ References preceded by "A" refer to pages in the Appendix to the Petition for Writ of Certiorari filed by the Cross-Respondents.

The opinions of the district court are officially reported at 807 F. Supp. 1073 (S.D.N.Y. 1992) (A12-42), 146 F.R.D. 61 (S.D.N.Y. 1992) and 814 F. Supp. 605 (S.D.N.Y. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994. KAL's timely petition for rehearing was denied by Order also dated December 5, 1994.² The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This Cross-Petition is not conditioned on the Petition for Writ of Certiorari of the Cross-Respondents filed on February 9, 1995.

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix hereto at CA5-8.

² The Court of Appeals originally issued an opinion on November 3, 1994. *See Zicherman v. Korean Air Lines*, Nos. 93-7490, 93-7546, 1994 Westlaw 606516 (2d Cir. Nov. 3, 1994). Following the filing by KAL of a Petition for Rehearing, the November 3, 1994 opinion was "withdrawn" and an "amended" opinion and judgment were filed on December 5, 1994, wherein the Court of Appeals also denied KAL's Petition for Rehearing. *See* Judgment and Order dated December 5, 1994 set forth in the Appendix hereto at CA1. References preceded by "CA" refer to pages in the Appendix hereto. KAL's suggestion for rehearing in banc was denied by Order dated January 20, 1995. *See* CA3.

STATEMENT OF THE CASE

A. Nature of the Case

This Cross-Petition involves only the question of whether nonpecuniary damages for loss of society are properly recoverable for a death on the high seas within the meaning of DOHSA, upon the basis of the general maritime law principles enunciated in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), and in light of *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

Decedent MURIEL KOLE (hereinafter "decedent"), was a passenger on KAL flight KE007 who was killed when the flight was shot down by Soviet military aircraft on September 1, 1983. The decedent's death occurred on the high seas within the statutory scope of DOHSA. 46 U.S.C. § 761. The Cross-Respondents are Marjorie Zicherman, the decedent's adult sister, and Muriel Mahalek, the decedent's mother, who sought damages individually and on behalf of the estate of the decedent, on the basis of the Warsaw Convention and DOHSA.

The action is governed by DOHSA and the Warsaw Convention, as supplemented by the Montreal Agreement.³ Although the Warsaw Convention has been held to create a wrongful death action for passengers killed during "international transportation by air,"⁴ the Convention is silent on the types of recoverable compensatory damages in the event of the death of a passenger. This question was intentionally left

³ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302).

⁴ *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

by the drafters of the Convention for determination by the internal damage laws of each contracting party to the Convention. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*"); *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1283 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987).

DOHSA is the internal law of the United States which is applicable to and prescribes the recoverable damages for all deaths occurring on the high seas. 46 U.S.C. § 761 (CA7). It is undisputed that the death of the decedent occurred on the high seas within the statutory scope and meaning of DOHSA. 46 U.S.C. §§ 761, 762 (CA7). DOHSA specifically restricts recoverable damages to pecuniary damages only and does not permit the recovery of nonpecuniary damages for loss of society. *See* 46 U.S.C. § 762 (CA7); *Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-25.

B. Disposition Below

1. The Damage Trial in the District Court

Prior to trial in the district court on the issue of recoverable compensatory damages,⁵ KAL moved, *inter alia*, for a determination that DOHSA, as the federal law directly applicable to all deaths occurring on the high seas, prescribes the recoverable damages in this case, that DOHSA provides for the recovery of pecuniary losses only and that DOHSA prohibits the recovery of nonpecuniary damages for loss of society. A15. The district court denied KAL's motion and held that Cross-Respondents were entitled to recover nonpecuniary

⁵ The liability of KAL was determined in the context of the multi-district litigation liability proceedings before Judge Aubrey Robinson, Jr. in the District of Columbia. *See* KAL's Brief in Opposition to Petition for Writ of Certiorari of Cross-Respondents at 3; *see also Korean Air II*, 932 F.2d at 1476-79.

damages for loss of society. A32-39. At the conclusion of the damage trial, the jury awarded nonpecuniary damages for loss of society in the sum of \$28,000 to Cross-Respondent Muriel Mahalek and \$70,000 to Cross-Respondent Marjorie Zicherman.

2. The Decision of the Court of Appeals

The Court of Appeals, recognizing that because the Warsaw Convention is silent on the question of recoverable damages, resolved that it had to decide "which federal law to apply" in determining whether nonpecuniary damages for loss of society are recoverable for a DOHSA death occurring during Warsaw Convention transportation. A5-6. The Court of Appeals concluded that nonpecuniary damages for loss of society are recoverable in this case "under the general maritime law principles of *Gaudet* and its progeny". A6.⁶ The court applied *Gaudet* because it considered itself bound by an earlier decision of the Second Circuit in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) ("*Lockerbie II*"), an action involving an aircraft crash over land to which DOHSA did not apply, where the court adopted general maritime law to determine the types of damages recoverable in a death action to which the Warsaw Convention applies.⁷ A5-6. The *Lockerbie II* court adopted *Gaudet* as representative of general maritime law and, therefore, allowed for the recovery of loss of society

⁶ *Gaudet*, 414 U.S. 573, a non-DOHSA case, held that loss of society damages were recoverable by the financially dependent wife of a longshoreman killed in the territorial waters of the United States, under general maritime law based on the doctrine of unseaworthiness. *Gaudet*, 414 U.S. at 585-90.

⁷ The *Lockerbie II* decision was itself premised on the Second Circuit's earlier holding in *Lockerbie I*, 928 F.2d at 1274-80, where the court held that the Warsaw Convention provides the "exclusive" cause of action for death and that "federal common law" governs this "exclusive" cause of action. *Lockerbie II* found general maritime law to be the best source of federal common law. *Lockerbie II*, 37 F.3d at 828-29.

damages in Warsaw Convention cases for deaths that occur over land. *Lockerbie II*, 37 F.3d at 828-29.

Although the death in this case occurred on the high seas within the meaning of DOHSA, unlike the deaths in *Lockerbie II*, the Court of Appeals declined to apply DOHSA, and instead extended *Gaudet* to the high seas to allow for the recovery of loss of society damages. A5-6. The court below rejected DOHSA and simply adopted *Gaudet* because:

1. the court in *Lockerbie I* had stressed that uniformity should govern the Convention cause of action, and the adoption of one damage rule for Convention cases involving deaths on land (general maritime law/*Gaudet*) and another damage rule for deaths on the high seas (DOHSA), would defeat the court's goal for uniformity in the types of damages recoverable in Warsaw Convention cases (A5-6); and

2. DOHSA's restrictive pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,' . . . including non-pecuniary loss" (A6).

On this basis, the Court of Appeals concluded that the general maritime law principles of *Gaudet*, rather than DOHSA, comprised the more appropriate internal law of the United States applicable to a Warsaw Convention death occurring on the high seas, and held that loss of society damages are recoverable in this case.

While holding that loss of society damages are recoverable for a death on the high seas generally, the court below held that a prerequisite to such an award is that the claimant must be financially dependent upon the decedent at the time of death. A7-8. In this case, the court set aside the award to decedent's mother for lack of financial dependency and remanded the case with respect to decedent's sister for a factual determination of her financial dependency. A7-8, A10.

Regardless of the court's ruling on dependency, the only issue presented by this Cross-Petition for review by the Court is the decision of the court below that loss of society damages are recoverable at all for a death on the high seas, a holding which is contrary to DOHSA, *Miles* and *Higginbotham*.

REASONS FOR GRANTING THE CROSS-PETITION

The Supreme Court and the Circuit Courts consistently have held that loss of society damages are not recoverable under general maritime law for any death occurring on the high seas. *Miles*, 498 U.S. at 31-33; *Higginbotham*, 436 U.S. at 624-26. Nevertheless, the Court of Appeals in this case has now held that loss of society damages are recoverable for a death on the high seas, in direct conflict with well established principles of federal law.

In allowing recovery for loss of society damages, the court below adopted the general maritime law principles of *Gaudet*, 414 U.S. 573, even though the Supreme Court has expressly limited *Gaudet* to its narrow facts and has refused to extend it to the high seas. *Miles*, 498 U.S. at 31; *Higginbotham*, 436 U.S. at 623.

The reason offered by the court below for rejecting DOHSA and allowing for the recovery of loss of society damages for a death on the high seas is that this is a Warsaw Convention death case. However, the Convention does not specify the types of recoverable "compensatory damages"⁸ and expressly defers to the internal law of each contracting state for the

⁸ The phrase "compensatory damages" is used to refer to damages except purely mental anguish and punitive damages, which are precluded by Article 17. See *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991) (damages for mental anguish, standing alone, are not recoverable under the Convention because they cannot be considered a "bodily injury" within the meaning of Article 17); *Korean Air II*, 932 F.2d at 1483-90 (punitive damages are not recoverable under the Convention because the Article 17 phrase "damage sustained" is compensatory in nature).

resolution of that question. Article 24, 49 Stat. 3020 (CA5); *see Korean Air II*, 932 F.2d at 1488; *Lockerbie I*, 928 F.2d at 1274-83; *Harris*, 820 F.2d at 1002; *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).⁹ Therefore, the issue which confronted the court below was not a Warsaw Convention issue but a domestic law issue as to the types of compensatory damages recoverable for a death on the high seas. The applicable law is clearly set forth in DOHSA and the precedents of the Court, which the court below chose to ignore.

In addressing the question whether loss of society damages are recoverable for a Warsaw Convention death occurring on the high seas pursuant to the internal laws of the United States, the court below regarded itself as faced with the determination of "which federal law to apply." A6. The choices, according to the court below, were either DOHSA or the general maritime law principles of *Gaudet*. A5-6. As the death of the decedent occurred on the "high seas," DOHSA is the internal federal law that prescribes the recoverable damages for *all* deaths occurring on the high seas. 46 U.S.C. §§ 761, 762 (CA7). DOHSA prohibits the recovery of loss of society damages. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 216-19, 233 (1986); *Higginbotham*, 436 U.S. at 624-25.¹⁰ The

⁹ This is because the drafters of the Convention found it "impossible" to adopt a uniform scheme for the types of recoverable compensatory damages. Int'l Conference on Private Aviation Law at 56-57 (Paris 1926), *quoted in Lockerbie I*, 928 F.2d at 1283-1285; *see Korean Air II*, 932 F.2d at 1488. Thus, it was concluded, that this issue should be governed by the internal law of each contracting state to the Convention. *See* Report of Henri de Vos, Reporter for *Comité International Technique d'Experts Juridiques Aériens* (Sept. 1928), *quoted in Korean Air II*, 932 F.2d at 1488.

¹⁰ It is unquestionable that DOHSA applies to wrongful deaths involving aircraft accidents on the high seas. *Tallentire*, 477 U.S. at 218-19; *Higginbotham*, 436 U.S. at 619; *Williams v. United States*, 711 F.2d 893, 896 (9th Cir. 1983); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972); *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 494-96 (2d Cir. 1958).

Court of Appeals, however, rejected DOHSA and opted to apply the general maritime law principles of *Gaudet* to allow the recovery of loss of society damages. A5-6.

The decision that nonpecuniary damages for loss of society are recoverable under *Gaudet* for a death on the high seas is in conflict both with (1) the holdings and rationale of the Court in *Higginbotham* and *Miles* and (2) the general maritime law of the United States. Moreover, the decision not to apply DOHSA to this death on the high seas is in direct conflict with the basic principle of statutory and treaty interpretation that a court should never interpret one as preempting the other, but rather should "always endeavor to construe them so as to give effect to both." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902). Because DOHSA addresses the very issue which the drafters of the Convention left to the internal law of the contracting parties, the Convention and DOHSA complement each other and are not in conflict. The court below, therefore, was required to apply the damage law of DOHSA in this Warsaw Convention death case and preclude any award of nonpecuniary damages for loss of society.

I

THE DECISION OF THE COURT BELOW CONFLICTS WITH DOHSA AND THE DECISIONS OF THE COURT THAT PROHIBIT LOSS OF SOCIETY DAMAGES UNDER GENERAL MARITIME LAW FOR AN AVIATION DEATH OCCURRING ON THE HIGH SEAS

Since the Court's decision in *Higginbotham*, no Circuit Court has disregarded DOHSA or permitted the recovery of loss of society damages for a death on the high seas under the general maritime law principles of *Gaudet*. Yet, this is exactly what the court below has done in adopting the principles of

Gaudet to the exclusion of DOHSA and in disregard of *Higginbotham*.

The court below characterized the issue before it to be “which federal law to apply”—DOHSA or *Gaudet*. A6. Contrary to the holding of *Higginbotham*, the court chose *Gaudet* over DOHSA. A6. In this, the court below erred.

In *Higginbotham*, a general maritime law and DOHSA action for the deaths of passengers arising out of a helicopter crash on the high seas, the Court addressed the question whether to apply the “rule chosen by Congress in [DOHSA] or the rule chosen by this Court in *Gaudet*” in determining the recoverability of loss of society damages. 436 U.S. at 623. The Court chose DOHSA. The Court specifically rejected any attempt to supplement the pecuniary damages allowed by DOHSA with nonpecuniary damages for loss of society available under general maritime law as set forth in *Gaudet*. 436 U.S. at 623-25. The Court limited *Gaudet* to the territorial waters and held that, because Congress in DOHSA had specifically limited recoverable damages to pecuniary losses, a court had no authority to authorize supplementary relief by judge-made maritime law that went beyond the remedies expressly authorized by Congress in DOHSA. 436 U.S. at 624-26.

Although *Higginbotham*, as this case, involved the death of an aviation passenger occurring on the high seas and the issue whether to apply DOHSA or *Gaudet* in determining whether loss of society damages are recoverable, the court below simply ignored *Higginbotham* in deciding to choose *Gaudet*, rather than DOHSA, as the applicable law in a Warsaw Convention case involving an aviation passenger killed on the high seas.

The rationale of the court below for disregarding DOHSA and the precedent of the Court is: (1) that “[a]dopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat” the perceived

judicial desire for a uniform damage law to govern all Warsaw Convention cases, and (2) DOHSA's pecuniary loss provisions cannot be reconciled with the "'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,' . . . including nonpecuniary loss." A5-6. This reasoning of the court below runs counter to the Convention itself and the interpretation of the Convention by the Court and other Circuit Courts of Appeal. Indeed, the reasoning of the court below serves only to further highlight the conflict created with the applicable decisions of the Court.

A. The Holding That Judicial Desire for Uniformity Can Override a Statute Is Contrary to *Higginbotham*

The rejection by the court below of DOHSA in favor of *Gaudet*, for the purpose of creating a uniform law of damages, is exactly what the Court in *Higginbotham* held a court cannot do.¹¹

The Court in *Higginbotham* specifically rejected any desire for uniformity as a justification for overriding DOHSA and allowing the recovery of loss of society damages for a death on the high seas:

We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to uniformity of maritime law As *Moragne* itself implied, *DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy*, both because of the interest in uniformity and because

¹¹ Of course, uniformity with respect to the types of recoverable compensatory damages was not a goal of the Convention. This matter was left *expressly* by the drafters of the Convention to be resolved in accordance with the internal damage laws of each contracting state. Article 24, 49 Stat. 2030 (CA5); *Korean Air II*, 932 F.2d at 1488; discussion *supra* at 7-8, note 9.

Congress' considered judgment has great force in its own right. It is true that the measures of damages in coastal waters will differ from the high seas, but *even if this difference proves to be significant, a desire for uniformity cannot override the statute.*

Higginbotham, 436 U.S. at 624 (emphasis added and footnotes omitted).¹² See *Miles*, 498 U.S. at 33.

Thus, the first justification of the court below for not applying DOHSA is contrary to the holding of the Court in *Higginbotham* that a judicial desire for uniformity cannot serve as a basis for overriding the statute.

B. The Holding That the Aim of the Convention Was to Provide for a Full Recovery Is Contrary to the Convention and the Decision of the Court in *Floyd*

In rejecting the damage provision of DOHSA, the court below stated that DOHSA's pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,' . . . including non-pecuniary loss". A6 quoting *Lockerbie II*, 37 F.3d at 829.¹³ This statement by the court below simply is in-

¹² The Court described the difference between the types of recoverable damages in territorial waters (loss of society allowed under *Gaudet*) and on the high seas (no loss of society allowed), as minor, because most federal statutes prohibit loss of society damages. *Higginbotham*, 436 U.S. at 624-25.

¹³ This rationale was not part of the original opinion issued by the court below on November 3, 1994, but was included in the amended opinion issued on December 5, 1994, apparently in response to KAL's argument in the rehearing petition that the court was required to give effect to both DOHSA and the Convention to the extent that they do not conflict. See *Zicherman*, 1994 Westlaw 606516 at 3. As noted *supra* at 7-8, note 9, DOHSA and the Convention are not in conflict because DOHSA addresses the precise issue which the Convention expressly left to be determined by the internal law of the contracting states.

correct.¹⁴ For over 25 years, the Court and the Circuit Courts have recognized that "the primary purpose of the contracting parties to the Convention [was]: *limiting the liability of air carriers* in order to foster the growth of the fledgling commercial aviation industry. . . ." *Floyd*, 499 U.S. at 546 (emphasis added); see *Trans World Air Lines v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (2d Cir. 1967), cert. denied, 392 U.S. 905 (1968).¹⁵ As the Court in *Floyd* clearly stated:

Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers,

. . . .

Floyd, 499 U.S. at 546 (emphasis added).

The Cross-Petition of KAL for certiorari should, therefore, be granted to bring the court below in line with the statutory provisions of DOHSA and the decisions of the Court in *Higginbotham* and *Floyd*.

¹⁴ The Convention itself places no restrictions on the types of "compensatory damages" recoverable. The Convention simply permits the recovery of those "compensatory damages" recognized by the applicable internal law of the contracting state.

¹⁵ "The second goal of the Convention was to establish uniform rules governing documentation such as airline tickets and waybills and uniform procedure for addressing claims arising out of international transportation." *Floyd*, 499 U.S. at 546, n 11.

II

**THE HOLDING THAT GENERAL MARITIME LAW
ALLOWS THE RECOVERY OF LOSS OF SOCIETY
DAMAGES IS CONTRARY TO THE GENERAL
MARITIME LAW AS DEVELOPED BY THE COURT
AND OTHER CIRCUIT COURTS**

The holding of the court below that *Gaudet*, and not DOHSA, is representative of the current state of general maritime law, conflicts with *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), *Higginbotham, Miles* and the decisions of other Circuit Courts of Appeal.¹⁶

The Court in *Miles*, 498 U.S. at 27-33, expressed a strong policy for restoring uniformity in the types of recoverable damages in federal law based cases, regardless of whether the action is brought under DOHSA, the Jones Act, 46 U.S.C. § 688 *et seq.* or general maritime law. In concluding that loss of society damages are not allowed for the death of a seaman occurring within the territorial waters, the Court stated in *Miles*:

Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

Miles, 498 U.S. at 33. Relying on *Moragne*¹⁷, the Court in *Miles* also reaffirmed that federal maritime statutes "both direct

¹⁶ As the Third Circuit recently stated: "*Gaudet* (together with its offspring, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980)) represents the first, and last, time that the [Supreme] Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 634 (3d Cir. 1994), *petition for cert. filed*, No. 94-1387 (Feb. 17, 1995).

¹⁷ The Court in *Moragne*, 398 U.S. at 375, recognized a general maritime wrongful death cause of action based on unseaworthiness for the death of a longshoreman killed on the territorial waters. *Cf. In re Mexico City*, 708 F.2d at 415 (taking guidance from *Moragne*, the court

and delimit" the actions of the courts, and that the courts must look to DOHSA and the Jones Act for guidance in determining whether to award loss of society damages, so that recovery or not of nonpecuniary damages remains uniform, no matter where the death occurs. 498 U.S. at 27, 30-33. For this reason, the Court in *Miles* emphasized that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to long-shoremen." *Miles*, 498 U.S. at 31; see *Higginbotham*, 436 U.S. at 623.¹⁸

The court below, without even referring to or discussing *Miles* or *Higginbotham*, disregarded the admonitions of the Court in resurrecting *Gaudet* and extending it to the high seas. A5-6.¹⁹ Moreover, the court below has created the very disunity in the general maritime law that the Court sought to eliminate in *Miles*.

In rejecting DOHSA and adopting *Gaudet* as the applicable rule on recoverable damages for a death occurring on the high seas, the court below has placed itself in conflict with decisions of other Circuits which have declined to rely upon *Gaudet* and which have looked to federal statutes as the

held Warsaw Convention creates cause of action and directed courts to look to federal statutes, "particularly" DOHSA, to answer damage issues not addressed by the Convention).

¹⁸ The cause of action for which *Gaudet* created a remedy was statutorily eliminated by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* *Miles*, 498 U.S. at 28. *Gaudet* "has therefore been condemned to a kind of legal limbo; limited to its facts, inapplicable on its facts, yet not overruled." *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993).

¹⁹ The Circuit Courts have recognized the limitations on *Gaudet* and have declined to extend it beyond those limits. See *Miller*, 989 F.2d at 1458 (limits on *Gaudet* have rendered it "virtually meaningless"); see also *Calhoun*, 40 F.3d 633-34; *Nichols v. Petroleum Helicopters*, 17 F.3d 119, 122-23 (5th Cir. 1994); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1090-92 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 130-31 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992).

"primary guide" to determine recoverable damages for personal injury or death under general maritime law. *See Calhoun*, 40 F.3d at 634 (the Supreme Court "has narrowed [Gaudet] to its facts so that the decision may be, for all intents and purposes, a dead letter."); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1407-08 (9th Cir. 1994), *petition for cert. filed*, No. 94-1214 (Jan. 12, 1995) (courts must look to maritime statutes for guidance in determining what damages are recoverable under general maritime law); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 601-602 (5th Cir. 1994) (nonpecuniary damages are not available under general maritime law); *Nichols*, 17 F.3d at 122-23 (loss of consortium damages are not available under general maritime law); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201-02 (1st Cir. 1994) (pursuant to the analysis prescribed by *Miles*, a court may not extend the remedies under general maritime law to include punitive damages or loss of parental or spousal society); *Walker v. Braus*, 995 F.2d 77, 82 (5th Cir. 1993) (on basis of *Miles*, but without deciding the issue, the court "acknowledge[d] strength of the argument that damages for loss of society may no longer be permitted in a general maritime law wrongful death action. . .")²⁰; *Miller*, 989 F.2d at 1458-59 ("reject[ing]" the reasoning of *Gaudet* and instead following the course set by *Moragne*, *Higginbotham* and *Miles*, the court looked primarily to federal maritime wrongful death statutes for guidance to conclude that punitive damages are not available under general maritime law).

The decision of the court below, that loss of society damages are recoverable for a death on the high seas pursuant to *Gaudet*, has placed the Second Circuit in isolation on this essential point of federal damage law. The Court, therefore, should grant this Cross-Petition to bring the Court of Appeals

²⁰ On remand, the district court concluded that damages for loss of society are no longer available under general maritime law no matter where the death occurs. *Walker v. Braus*, 861 F. Supp. 527 (E.D. La. 1994).

below in line with the decisions of the Court and other Circuit Courts of Appeal. Review should be granted as well to reaffirm that the teachings of *Higginbotham* and *Miles* are still valid, even where the death on the high seas involves a Warsaw Convention air transportation passenger. Otherwise, the decision of the court below, disregarding and departing from these decisions, may spawn an erosion of the holdings of the Court in this area of federal law.

III

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE COURT IN ORDER TO PROVIDE DEFINITIVE GUIDANCE TO THE LOWER COURTS

The issue presented for review involves an important question of federal law that will arise in every Warsaw Convention death case occurring on the high seas, territorial waters or on land. Review should be granted so that the Court may provide an early and definitive guide for the lower courts to avoid inconsistent interpretations of the Convention, DOHSA and general maritime law in air crash disaster cases.

For example, in the litigation arising out of the KAL 007 air crash disaster, there currently are 12 cases pending in the Second, Sixth, Ninth and D.C. Circuit Courts of Appeal, which involve the same issue as presented for review herein and where the district courts have taken conflicting positions on the issue of the recoverability of loss of society damages. **Second Circuit:** *Hollie v. Korean Air Lines*, Nos. 94-7208, 94-7218 (2d Cir.) (oral argument scheduled for April 5, 1995) (district court held loss of society damages are not recoverable); **Sixth Circuit:** *Bickel v. Korean Air Lines*, Nos. 93-2144, 93-2206, 93-2259, 93-2341 (6th Cir.); *D. Jones v. Korean Air Lines*, No. 93-2549 (6th Cir.); *Bowden v. Korean*

Air Lines, Nos. 94-1096, 94-1098 (6th Cir.); *James v. Korean Air Lines*, No. 94-1095 (6th Cir.); *M. Jones v. Korean Air Lines*, Nos. 94-1100, 94-1101 (6th Cir.) (appeals argued January 31, 1995) (district court held loss of society damages are recoverable); **Ninth Circuit:** *Saavedra/Yamaguchi v. Korean Air Lines*, Nos. 94-55018, 94-55060, 94-55161 (9th Cir.) (briefing completed, awaiting oral argument) (district court held loss of society damages are not recoverable); *Saavedra/Okai v. Korean Air Lines*, Nos. 94-55495, 94-55496 (9th Cir.) (briefing completed, awaiting oral argument) (district court held loss of society damages are not recoverable); *Kole v. Korean Air Lines*, No. 95-15117 (9th Cir.) (briefs not submitted) (district court held loss of society damages are recoverable); **District of Columbia Circuit:** *Oldham v. Korean Air Lines*, Nos. 94-5321, 94-5338 (D.C. Cir.) (briefs not submitted) (district court held loss of society damages are recoverable); *Ocampo v. Korean Air Lines*, Nos. 94-5323, 94-5324 (D.C. Cir.) (briefs not submitted) (district court held loss of society damages are recoverable); *Maikovich v. Korean Air Lines*, No. 94-5371 (D.C. Cir.) (awaiting briefing schedule) (district court held loss of society damages are recoverable).

In addition to the foregoing pending appeals, there are over 40 cases pending in the district courts arising out of the same disaster involving the same issue as to the recoverability of nonpecuniary damages for loss of society.

It is desirable, therefore, to have a definitive and early ruling from the Court on this issue to avoid further inconsistent results in the lower courts.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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